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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUN 13 2007

SRC 06 077 50371

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Maura Deadrick

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability or a member of the professions holding an advanced degree. The petitioner seeks employment as a postdoctoral research associate. The petitioner asserts that an exemption from the requirement of a job offer, and thus of an alien employment certification, is in the national interest of the United States. The director did not contest that the petitioner qualifies for the classification sought, but concluded that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a statement and additional evidence of accomplishments after the date of filing. For the reasons discussed below, we uphold the director's ultimate decision. It is clear that, at best, the petitioner filed the petition prematurely, before the petitioner's work had had an opportunity to influence the field. Notably, the petitioner had yet to publish a single article in her field as of the date of filing, the date on which the petitioner must establish her eligibility. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner holds a Ph.D. in Chemical Engineering from New Mexico State University (NMSU). The petitioner's occupation falls within the pertinent regulatory definition of a profession. The petitioner thus qualifies as a member of the professions holding an advanced degree. The remaining

issue is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't. of Transp., 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on *prospective* national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The director did not contest that the petitioner works in an area of intrinsic merit, chemical engineering or that the proposed benefits of her work, improved filtration of water using environmentally sound technology, would be national in scope. At issue, then, is whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The director first noted the types of assertions that cannot, by themselves, support a finding of eligibility: that the alien has acquired a certain level of training or education, which can be

articulated on a labor certification, and the prestige of the alien's occupation. The director then noted that conducting research is inherent to the petitioner's occupation and concluded that the petitioner had not demonstrated the significance of her role on various research projects or that her projects had already influenced the field.

On appeal, the petitioner asserts that more than 50 Ph.D. recipients applied for her job and that she was selected because her research abilities and competence "stood me out." The petitioner further asserts that the alien employment certification process "is a long and tedious procedure, which [will] put the continuity of my research activity at risk." The petitioner then quotes from several reference letters. The petitioner asserts that the director failed to consider the petitioner's reference letters in considering how she compared with other researchers. Finally, although the petitioner concedes that she must establish her eligibility as of the date of filing, she submits articles published after that date and a proposal accepted after that date. The petitioner also submits evidence that she was requested to review manuscripts for publication prior to the date of filing.

As stated above, we do not question the significance of the petitioner's *area* of research. Eligibility for the waiver, however, must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Matter of New York State Dep't of Transp.*, 22 I&N Dec. at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.* at 221. Moreover, while we acknowledge the petitioner's concerns about the alien employment certification process on appeal, nothing in the legislative history suggests that the national interest waiver was intended simply as a means for employers (or self-petitioning aliens) to avoid the inconvenience of that process. *Id.* at 223.

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification she seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As stated above, the petitioner received her Ph.D. in 2004 from NMSU under the guidance of [redacted] She then accepted a postdoctoral position at Clemson University in the laboratory of [redacted] She remained in that position as of the date of filing. As of the date of filing, according to the petitioner's curriculum vitae and the evidence submitted, the petitioner had presented her work at two conferences and had eight manuscripts in the process of publication, none of which had actually been published and, thus, disseminated in the field. On appeal, the petitioner

submits evidence that, as of the date of filing, she had reviewed manuscripts submitted for publication.

It is the above record that we must examine. Any future accomplishments, such as the actual publication of her work or acceptance of her proposals, cannot be considered and would need to form the basis of a new petition. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Specifically, we cannot "consider facts that come into being only subsequent to the filing of a petition." *Matter of Izummi,* 22 I&N Dec. 169, 176 (Comm. 1998) *citing Matter of Bardouille,* 18 I&N Dec. 114 (BIA 1981). To hold otherwise in petitions for researchers would have the untenable result of an alien securing a priority date based on the speculation that her work might prove influential while the petition is pending.

On appeal, the petitioner asserts that the director failed to accord her reference letters sufficient evidentiary weight. We will consider the letters below. At the outset, however, we note that Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795-796. CIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *See also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

In evaluating the reference letters, we further note that letters containing mere assertions of cutting edge results and ability are less persuasive than letters that provide specific examples of how the petitioner has influenced the field. In addition, letters from independent references who were previously aware of the petitioner through her reputation and who have applied her work are far more persuasive than letters from independent references who were not previously aware of the petitioner and are merely responding to a solicitation to review the petitioner's curriculum vitae and work and provide an opinion based solely on this review.

[redacted]v asserts that the petitioner "was considered the top Ph.D. student in the department by the faculty based on her performance on the qualifying examination." Academic performance, measured by such criteria as grade point average, cannot alone satisfy the national interest threshold or assure substantial prospective national benefit. In all cases the petitioner must demonstrate specific prior achievements that establish the alien's ability to benefit the national interest. *Matter of New York State Dep't. of Transp.*, 22 I&N Dec. at 219, n.6. [redacted] discusses the petitioner's Ph.D. research on converting pecan shells into activated carbons with ion-exchange properties, widely used in water/waste water treatment systems. To improve the expensive and time-consuming process of choosing an appropriate raw material and optimize activation conditions, it is necessary to develop a model to qualitatively predict the physicochemical properties of carbon products under various

conditions [redacted] asserts that the petitioner "is among the first to do that." While [redacted] asserts that he and the petitioner prepared four manuscripts on this work, he acknowledges that none of them were published as of the date of his letter. [redacted] praises the petitioner's professionalism and skills, but fails to provide any examples of this work influencing the field.

The petitioner also provided two letters from her collaborators at NMSU. These letters do not establish the petitioner's influence beyond her immediate circle of colleagues.

[redacted] asserts that the petitioner plays a critical role on projects funded by the National Science Foundation (NSF) and the American Water Work Association Reference Foundation (AwwaRF). It can be argued that most research, in order to receive funding, must present some benefit to the general pool of scientific knowledge. It does not follow that every researcher working with a government grant inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] then discusses the potential benefits of several projects on which the petitioner is working. Specifically, the petitioner investigated a series of modified activated carbons with different properties, expanding our understanding of the adsorption of aromatic SOCs, detrimental man-made compounds such as benzene, by activated carbons. [redacted], Director of the School of the Environment at Clemson University, asserts that the petitioner's work on aromatics "is the first time the adsorption properties of adsorbents have been characterized as comprehensively from many different aspects." [redacted] asserts that this work provides "theoretical guidance for the practical application of activated carbon to the adsorption of specific aromatics." [redacted] acknowledges, however, that the manuscripts reporting this work are still in preparation.

The petitioner also investigated the removal of dissolved organic matter (DOM), which can produce carcinogens when it reacts with oxidants/disinfectants such as chlorine. [redacted] explains that the petitioner "applied different activated carbon properties in the adsorption of DOM by activated carbons," increasing the DOM adsorption rate "more than 100% at typical water treatment conditions." [redacted] speculates that this work "will" improve the application of activated carbons. [redacted] notes that this work was presented at a conference and asserts that manuscripts are under preparation. [redacted] asserts that the petitioner improved static DOM adsorption by 40 percent and increased adsorption by more than 100 percent in small-scale column tests.

Finally, [redacted] discusses the petitioner's work with arsenic, her current "objective." [redacted] merely speculates that this work "will also make [an] important contribution to [the] drinking water treatment field."

[redacted], a member of the Project Advisory Committee which oversees the AwwaRF funded research project on which the petitioner works, asserts that he has reviewed several project reports and speculates that the petitioner's work "will" contribute to several areas of water treatment.

He provides no examples of water treatment plants already investigating or applying the petitioner's work and does not assert that the petitioner's processes are being considered for adoption in official water treatment guidelines.

In response to the director's request for evidence that the petitioner's articles had been cited,[1] the petitioner submitted additional letters in an attempt to demonstrate her impact on the field. While some of the letters are independent, they are not persuasive as to the petitioner's influence in the field as of the date of filing. Specifically, the letters are written after the date of filing and do not explicitly refer to events prior to that date. For example, several of the letters submitted in response to the director's request for additional evidence discuss the petitioner's published work although she had yet to publish a single article as of the date of filing.

[redacted] asserts that she learned of the petitioner's work through the petitioner's published article in *Carbon* and presentation at an American Chemical Society (ACS) conference even though [redacted] is a visiting professor at Clemson University where the petitioner has worked since before her article appeared in *Carbon* and her presentation for the ACS. [redacted] implies that the petitioner's work helped [redacted]'s group choose an activated carbon for their own research. As Basova references a publication that had not been published as of the date of filing and a presentation that had not occurred as of the date of filing, it is not clear that [redacted] was using the petitioner's research as of that date. Regardless, [redacted]'s use of the petitioner's work does not establish the petitioner's influence beyond the institution where she is employed.

[redacted], Executive Director of WERC, a consortium of three New Mexico universities that funded the petitioner's research, asserts that the petitioner's research is "original, novel and at the forefront" of an important field.

> For example, [the petitioner] was the first who demonstrated that the properties of final activated carbon products can be predicted according to the corresponding activation conditions and the composition of raw material without direct experiments. [The petitioner] was among the first who discovered that the acidic surface groups of activated carbon prepared by phosphoric acid activation consist of temperature-sensitive and temperature-insensitive two parts, and the later part consists of mainly phosphorus-containing groups. Further, [the petitioner] demonstrated that the reactivity of raw materials under acidic condition significantly influence the pore structure of final activated carbon products prepared by H_3PO_4 activation, raw materials easily hydrolyzed under acidic condition tend to develop mesopores. [The petitioner's] original discoveries have been accepted to [be] publish[ed] in the international circulated, peer-reviewed Journal of Carbon.

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[1] While widespread citation is probative evidence of an article's influence, unpublished articles are rarely cited. As the director's request indicated that the petitioner's articles had not even been published, it is unclear why the director requested evidence that they had been cited.

Any Ph.D. thesis or postdoctoral research, in order to be accepted for graduation, publication or funding, must offer new and useful information to the pool of knowledge. It does not follow that every researcher who performs original research that adds to the general pool of knowledge inherently serves the national interest to an extent that justifies a waiver of the job offer requirement.

[redacted] an associate professor at Arizona State University, discusses the petitioner's work on arsenic presented at a spring 2006 conference. This work was presented after the date of filing and, thus, is not evidence of the petitioner's influence in the field as of that date.

[redacted] a senior research chemist at Lorillard Research Center of Lorillard Tobacco in South Carolina, asserts that the petitioner's activated carbons from rice husks demonstrate the necessary adsorption capacities necessary for cigarette filters. [redacted] does not, however, assert that Lorillard is now pursuing filters based on the petitioner's work or that the company had been influenced by the petitioner's work as of the date of filing.

The strongest letter is from [redacted], a production manager at Cardolite Corporation. [redacted] explains that he is responsible for "the production of high quality epoxy curing agent derived from cashew net shell liquid (CNSL)." As to his knowledge of the petitioner's work, he states:

> I knew [the petitioner's] research and had further interaction with her due to consulting on the treatment of wastewater generated in the preparation of epoxy curing agents. The main contaminants of this wastewater are organic, such as polyamine. For small-scale wastewater treatment, activated carbon adsorption methods have the advantages of easy operation, minimum pretreatment and post treatment requirement, and minimum sludge handling. In addition, activated carbon is most effective at removing organic compounds.

[redacted] asserts that the petitioner recommended activated carbons containing acidic surface groups based on her previous research results. [redacted] concludes that "the laboratory test results have show[n] that activated carbons prepared from pecan shell by phosphoric acid activation according to [the petitioner's] technique demonstrate extremely promising properties on the control of the wastewater generated in our company." Finally, [redacted] asserts that the publication of the petitioner's work and her invitation to present her work at an American Chemical Society (ACS) conference are evidence of her reputation in the field. The petitioner had not, however, been published as of the date of filing, nor had she presented her work at an ACS conference as of that date. Rather, the work on which she had participated had been presented at AwwaRF conferences.

On appeal, the petitioner asserts that [redacted] "learned my work [sic] through counsel." She explains, however, that subsequent "excellent laboratory study results have given strong evidence of the importance of my research work to the treatment of wastewater produced during the production of epoxy curing agents from cashew nut shell liquid."

The letter from [redacted] and the petitioner's assertions on appeal suggest that the petitioner's work has potential and, based on counsel's personal promotion of this work, is beginning to be considered by at least one company. The record does not establish whether counsel brought the petitioner's work to the attention of [redacted] before or after the date of filing. Regardless, it can be expected that if the petitioner's work had influenced the field as a whole prior to the date of filing that work would be widely cited or at least being considered by several companies or government agencies. In response to the director's request for evidence that the petitioner's work had been cited, counsel asserted that her work was practical and, thus, could not be expected to be widely cited. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Several references, however, assert that the petitioner's work has theoretical research applications in addition to practical applications. Given the record as a whole, it would appear that the petitioner's work was not amenable to having been cited as of the date of filing as it had yet to be published and, thus, widely disseminated.

The record establishes that the petitioner is respected by her colleagues and that her work has practical applications. The petition, however, appears to have been filed, at best, prematurely, before the petitioner's work was widely disseminated and available for consideration, investigation, confirmation and application by independent experts in the field.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved alien employment certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by an alien employment certification certified by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.